83-360

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

JERRY THOMAS JOHNSON,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI

PHILIP A. DeMASSA
Attorney at Law
2150 First Avenue
San Diego, California 92101-2195
Telephone: (619) 236-0897

Attorney for Petitioner
JERRY THOMAS JOHNSON

QUESTION PRESENTED FOR REVIEW

Is a defendant entitled to a dismissal of the charges against him due to outrageous governmental conduct of supplying drugs or narcotics to him for ingestion, injection, or consumption?

INDEX

TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

_____

_____

JERRY THOMAS JOHNSON,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT,

_____

_____

PETITION FOR WRIT OF CERTIORARI

_____

_____

Petitioner, Jerry Thomas Johnson, prays that a writ of certiorari issue to review the Memorandum Decision of the United States Court of Appeals, for the Ninth Circuit, filed May 11, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit and the Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Suggestion for Rehearing In Banc are reproduced in the Appendix attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sections 1254 and 2101, this being a petition arising out a federal criminal conviction involving a constitutional issue. The petition is filed within 60 days of denial of petitioner's petition for rehearing and suggestion for hearing in banc by the United States Court of Appeals for the Ninth Circuit filed on July 27, 1983.

CONSTITUTIONAL PROVISION AT ISSUE

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In the latter part of 1980, Agent Magno of the Drug Enforcement Administration (DEA) was working in an undercover capacity in Brazil posing as a narcotics courier for Joao Magalhaenes. (R.T. 457-459). In October, Magalhaenes sent Agent Magno to Miami with some jewels that Magno was supposed to deliver for sale in the United States. He also gave Magno a card with several phone numbers on it. Margo was supposed to call Carlos concerning the delivery of narcotics. Upon his arrival in Miami, Magno called one of the phone numbers and spoke to "Carlos". He met "Carlos" and another man the next day. "Carlos" was defendant Carlos Rubio. (R.T. 460-462, 480-482). (Other defendants who are not part of this petition will be so referred).

At his first meeting with Magno,

Rubio told him that he could not discuss narcotics in the presence of his companion, since his companion was just there concerning the jewels. (R.T. 465). Magno met Rubio the following day for lunch, and they discussed the purchase of narcotics by Rubio. Rubio discussed purchasing ten kilograms of cocaine per delivery at $35,000.00 per kilogram, with $10,000.00 per kilogram to be paid up front. Rubio was happy with the deal, but said that he was unable to consummate it for awhile because of other pending business. (R.T. 465-466).

Working with Agent Magno in Florida was an undercover informant, Ramon Herrera. (R.T. 466). Rubio told Herrera that his people could handle 30 kilos. He also told Herrera that he was related to the Gambino organized crime family in New York. (R.T. 561-562). The DEA never verified this information.

Magno and Herrera met Rubio in December 1980 in Fort Lauderdale and discussed possible cocaine transactions. (R.T. 467). Rubio negotiated a lower price of $33,000.00 per kilo for 100 kilos

a month. (R.T. 567). Arrangements were made for Rubio to go to Brazil to see a sample sometime in January. (R.T. 468). Magno made it clear to Rubio that if he did not want to do the deal, he should not do it. (R.T. 488). Rubio did not go to Brazil to look at the sample.

Agent Magno met with Rubio in April, 1981 in Miami. (R.T. 469, 498, 500). Rubio wanted Magno to front him the cocaine and Magno refused. (R.T. 496). Magno told Rubio that if he did not have the money to do the deal the way they had discussed it, Rubio would have to deal with Magno's associate in the United States. (R.T. 469). DEA Agent Mazzilli was playing the role of Magno's associate in the United States who had cocaine for sale that had already been delivered to the United States from Brazil. (R.T. 534, 949).

Mazzilli met with Rubio on April 16, 1981, at Lester's Diner in Fort Lauderdale. Present with Rubio was a man named Pedro. Rubio was using the name Carlos Gambino. (R.T. 845-846). At this

meeting, Rubio said that he and Pedro had customers from the West Coast interested in large quantities of cocaine. They wanted to purchase 2 kilos at $45,000.00 a kilo, delivered in Florida. Mazzilli told Rubio to contact Herrera when Rubio had his money together. (R.T. 574-575, 847-848). No deal was consummated at that time.

On June 1, 1981, Herrera met with Rubio and a man named Carlos whose last name was unknown (Lnu). They said that they had people available who wanted to do multi-kilo deals. A further meeting was arranged for the next day. (R.T. 571-578).

On June 2, 1981, Agent Magno and Herrera met Rubio, Carlos Lnu, and co-defendant Garrison at the Holiday Inn in West Palm Beach. Rubio said that Garrison was a big marijuana dealer interested in buying cocaine. Rubio asked Magno to front Garrison a kilo of cocaine. Magno refused. Garrison wanted Magno to go to California to sell cocaine. Magno said that he would if

Garrison would supply plane tickets and expense money. No deal was made at that time. (R.T. 471-474, 578). Several hours after the meeting broke up, Rubio called Herrera. Rubio told Herrera that they would provide the plane tickets and asked Herrera to convince Magno to do the deal. (R.T. 583-584).

On June 4, 1981, Rubio, Garrison, and Carlos Lnu met with Herrera, Agent Mazzilli, and Agent Georges at the Banana Boat Lounge. Garrison said that he had a 63-person distribution organization, that he was converting from distributing marijuana to cocaine, and that he wanted to start with 10 kilos of cocaine and work up to approximately 100 kilos per month. (R.T. 852-853, 980). Rubio and Garrison said that Garrison would pay the agents' expenses to go to California and that they would have buyers ready for 10 kilos. Rubio said that he would be in touch with Herrera to give Mazzilli the plane tickets and expense money. (R.T. 854-855).

On June 6, 1981, Carlos Lnu delivered

to Mazzilli four round-trip tickets to San Diego, $4,700.00 in cash and a note from Rubio containing the phone numbers where he and Garrison could be reached in San Diego. (R.T. 587-589, 856).

On June 11, Agents Mazzilli and Georges, with Herrera, met Rubio, Garrison and co-defendant Lawson at the Butcher Shop Restaurant in San Diego. Garrison and Lawson said that they had 16 one kilo customers lined up. Garrison requested a kilo of cocaine to use as a sample to show the customers. Mazzilli was displeased and told them he thought the deal was already set and all this sitting around was costing him money. Garrison offered to provide Mazzilli with additional expense money to sit tight. Garrison provided Mazzilli with an old Cadillac to use for transportation. The agents and Herrera returned to the hotel. (R.T. 590-592, 863-869).

Later that same day, at about 7:00 p.m., there was another meeting at the Butcher Shop between Mazzilli, Garrison, and Lawson. Garrison gave Mazzilli

$3,500.00 and the key to a Mercedes to use for transportation. Mazzilli still refused to front the cocaine. However, he told them that if they sold two kilos, he would front the third one. (R.T. 872-873).

On June 12, 1981, Mazzilli had several phone calls with Garrison. He set up a meeting for 12:00 to 12:15 p.m. at Anthony's Restaurant, across the street from the agent's hotel. (R.T. 878-879). Garrison and Lawson met with the agents and discussed the deal, including quantity and quality of the cocaine. After the meeting, Mazzilli had a phone conversation with Rubio, who said the deal was set, that they had about $70,000.00 together. (R.T. 890-895).

On June 13, 1981, at about 11:15 a.m., Mazzilli had a phone conversation with Garrison. He said that he had a lady who wanted two kilos and a man from Florida who wanted a kilo. (R.T. 895-896). Arrangements were made to meet at noon. At about 12:15 p.m., Agent Mazzilli and Georges met Lawson and Rubio

in front of Anthony's. Rubio asked if the agents were ready to deliver. They asked Rubio if they were ready to show the money. Rubio said that they were. (R.T. 1389-1390). At that point, Lawson introduced defendant Freydberg and petitioner Johnson, who were standing nearby. Lawson said that Johnson and Freydberg were a set of purchasers. Just then, Garrison arrived in a vehicle with defendant Christie. Defendant Unger and Walker were following Christie in another car. Garrison told Agent Georges that Unger, Christie, and Walker were another set of purchasers. (R.T. 1392-1395).

While standing in the parking lot of Anthony's, petitioner and Freydberg showed Mazzilli $50,000.00 contained in an envelope in the trunk of Freydberg's car. Johnson placed the money in a briefcase. (R.T. 898-899).

Mazzilli, Freydberg, and petitioner joined Rubio, Unger, Christie, Walker, Garrison, and Lawson in front of the Holiday Inn across the street from Anthony's. Mazzilli addressed the entire

group. He told them that due to the large number of people, he would take one set of purchasers to the room to negotiate while the rest stayed in the coffee shop. (R.T. 1395). Mazzilli and Georges then took petitioner and Freydberg to the undercover room. (R.T. 901, 1395-1397).

The meeting in the undercover room was video taped. At the meeting, petitioner and Freydberg showed the money again. (R.T. 1396-1397). During the meeting, Freydberg said that he could do 100 kilos a month. (R.T. 596-598). Petitioner took a tall glass and some chlorox out of his briefcase. After a very short meeting, petitioner and Freydberg were escorted down to the hotel coffee shop to wait while Mazzilli negotiated with the second set of purchasers. (R.T. 1396-1397). Agents Mazzilli and Georges went with petitioner and Freydberg to the coffee shop, where they sat at a table. Also present, sitting about fifteen feet away, were Rubio, Unger, Walker, Christie, Garrison, and Lawson. Mazzilli asked everybody at

that table if they were ready to do their deal. Unger and Walker said they were nervous about doing a deal in a hotel. Unger said that she preferred doing the deal at her house and that she did not like to have the cocaine and the money together at one place. Mazzilli assured her that they could do the transactions separately if she so desired. Unger and Christie then went with Mazzilli to look at the cocaine. (R.T. 910-912).

Unger and Christie were video taped while they were meeting with Mazzilli. Unger and Christie were shown a kilo of cocaine. Unger chopped up some of the cocaine and placed it in a glass of chlorox. The agents encouraged Unger to inhale cocaine, to "stick their nose in the bag," and to take a "whack at it." Unger did inhale an amount of cocaine in the presence of the agents.

At about 4:15 petitioner Johnson and Freydberg returned to the Holiday Inn. Petitioner went to the room with Mazzilli while Freydberg stayed at his car with George. (R.T. 917, 1414, 1415).

Johnson's meeting with Mazzilli was video taped. At the beginning of the conversation petitioner expressed dissatisfaction with doing the cocaine transaction. During the approximate 30 minutes of video tape, the agents encouraged petitioner to nasally ingest cocaine for the purpose of determining the quality of the cocaine. During this meeting, petitioner did a chlorox test and a burn test of the cocaine. (R.T. 928-930). Petitioner also ingested some cocaine. The cocaine was not acceptable to Johnson because its cosmetic appearance was not right for his customers and distributors. (R.T. 970). As petitioner was leaving the room he was placed under arrest.

Petitioner was convicted by jury trial of conspiracy to possess with intent to distribute cocaine. 21 U.S.C. Section 846 and Section 841(a)(1). He did not testify.

At a post conviction hearing Motion to Dismiss Due to Outrageous Governmental Misconduct, DEA Agent Mazzilli, in

charge of the investigation, indicated that a telex was sent to Washington for permission during the investigation to provide to a defendant a one gram sample of cocaine and allowing a four kilo cocaine flash amount to be shown the potential defendants. (R.T. 2958). Washington DEA Headquarters sent a teletype back to the agents on June 11, indicating the Department's permission to distribute a one gram sample to a defendant. (R.T. 2959-2960).

Drug Enforcement Administration guidelines indicate that undercover operations should not include the furnishing of a controlled substance except in extraordinary cases. (R.T. 2168).

Mazzilli further answered at the dismissal hearing:

(By defense counsel)

"Q All right. The word, use the word 'furnished,' is that defined in any D.E.A. report?"

(DEA Agent Mazzilli)

"A No, it is not.

Q What does the word 'furnished' mean to you in the context of a sting operation like this?

A Delivered to.

Q What do you mean 'delivered to'?

A Hand to. Delivered to.

Q Does that allow you to allow a defendant to use the drugs?

A Yes, sir. If he chooses to.

Q All right. Are there any regulations about the allowance of agents to allow potential defendants to ingest or use drugs?

A Whatever regulations there are concerning that, you have a copy of.

Q So other than the copies which have been marked defendants' Exhibit 'A,' there are no other regulations regarding the allowance by agents of potential defendants in using drugs?

A That is correct.

Q So, if a defendant wanted to test a drug by another method other than ingesting it, you would allow him to do that; is that correct?

A That's correct.

Q So if he wanted to inject it hypodermically intravenously, you would allow him to do that?

A Absolutely. What he wants to put in his system is up to himself.

Q And there have been no guidelines formulated nor has there been any training given to you agents to try to have or attempt to dissuade a potential defendant from using drugs as a method of testing?

A Absolutely none.

Q You have been to no workshops, no lectures, no seminars and have received no guidelines or training in that regard?

A That is absolutely right." (R.T. 2990-92).

The district court denied petitioner's motion to dismiss. This ruling was upheld by the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I

A DEFENDANT IS ENTITLED TO A DISMISSAL OF THE CHARGES AGAINST HIM DUE TO OUTRAGEOUS GOVERNMENTAL CONDUCT OF SUPPLYING DRUGS OR NARCOTICS TO HIM FOR INGESTION, INJECTION OR CONSUMPTION.

A. Due process principles of the Fifth Amendment are a bar to prosecution when the government intentionally supplies drug or narcotics to a defendant and encourages his consumption of them.

The testimony of DEA Agent Mazzilli makes clear that the government exercises no controls, training, or safeguards regarding its avowed policy of allowing drug agents to encourage a potential defendant to use drugs, or, ultimately, injecting heroin so that a drug investigation may be successfully completed. Such a policy is repugnant to fundamental and traditional concepts of due process.

The stated governmental policy as

espoused in this case, coupled with the actual encouragement of DEA agents that petitioner and later two female defendants to ingest drugs for purposes of testing constitutes conduct so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

A majority of this Court has held that an otherwise disposed defendant cannot claim a defense of entrapment when the government agents supply an essential, legal, but difficult to obtain chemical ingredient to the defendant. United States v. Russell, 411 U.S. 423 (1973).

Mr. Justice Rehnquist, writing for the Russell majority, held that there may be a limit to which the majority would not tolerate law enforcement excess, and to which a due process defense would apply:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so

> outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952), the instant case is distinctly not of that breed". 411 U.S. 431-32.

The Court's example of outrageous government conduct, Rochin v. California, supra, reveals an extreme example of police conduct which the Court could not countenance under the Due Process Clause. Rochin was forcibly removed from his residence and taken to a hospital for a stomach pumping to force the disgorging of two capsules Rochin had taken. The Court recognized its "responsibility" to decide whether under the Due Process Clause court proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses". 342 U.S. at 169, citing Malinski v. New York, 324 U.S.

401, 417 (1945). (Frankfurter, J., concurring).

The Russell court carefully pointed out that federal Agent Shapiro did not "violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise". 411 U.S. at 430.

In the instant case, the federal agents violated both federal and state penal statutes by allowing petitioner and others to become under the influence of narcotics and/or drugs. California Penal Code Section 647(f), California Vehicle Code Sections 23152, 23153, California Health and Safety Code Section 11352, Title 18 U.S.C. Sections 2, 13, Title 21 U.S.C. Sections 844, 845, 846.

While eschewing the availability of the due process defense, Russell did make a finding that the conduct of law enforcement as to Russell stopped far short of violating the Due Process Clause of the Fifth Amendment. 411 U.S. at 432.

The Court also affirmed its Constitutional responsibility to oversee

the Executive Branch in the enforcement of the laws "subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." 411 U.S. at 435.

Several months after Russell, Judge Friendly expressed extreme distaste for governmental agents engaging in crimes in violation of state or federal law. United States v. Archer, 486 F.2d 670, 674-675 (2d Cir. 1973). Judge Friendly cited Mr. Justice Brandeis dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928) as applicable to the facts in Archer:

> "'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent

teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." 486 F.2d 674-675.

Although not deciding Archer on the due process issue, Judge Friendly felt that the Olmstead reasoning would forcefully apply:

"...there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to

> permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.'" 486 F.2d at 676-677.

Hampton v. United States, 425 U.S. 484 (1976) has not abrogated the availability of the due process defense. Where Hampton was convicted despite his claim that the heroin had been supplied by a government informer and then sold by

Hampton to an undercover agent, Mr. Justice Rehnquist's plurality opinion, joined by Chief Justice Burger and Mr. Justice White, ruled out the fundamental fairness, or due process, defense. The plurality held that a defendant's remedy relative to acts of government agents "lies solely in the defense of entrapment". 425 U.S. at 490.

Mr. Justice Powell, joined by Mr. Justice Blackmun, although concurring in the plurality result, refused to agree that fundamental fairness embodied in the guarantee of due process would not be an available defense. Id. at 493-494.

Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, dissented. The dissent would hold that the police activity constituted entrapment as a matter of law. Id. at 497. The three dissenters also concluded that Russell does not foreclose a bar to conviction under due process principles. The dissent found the police activity in Hampton to be "beyond permissible limits". 425 U.S. at 497.

See also, United States v. Twigg, 588 F.2d 373, 380-382 (3rd Cir. 1978).

Similar to the outrageous extraction of suspected drugs as condemned in Rochin, supra, the conduct of law enforcement in petitioner's case to encourage the consumption of drugs as a law enforcement technique is so outrageous that due process would absolutely bar petitioner's conviction. The furnishing of narcotics to defendants for use is hardly the "limited participation" sanctioned in Russell, supra, 411 U.S. at 432.

B. The Court should exercise its supervisory powers and refuse to countenance the outrageous law enforcement practice of supplying drugs or narcotics to potential defendants for consumption.

The Court has given deference to law enforcement's "all but impossible task" of investigating drug offenses. United States v. Russell, supra, at 432. Russell argued that the judicially devised exclusionary rule regarding illegal

searches and seizures should also proscribe the activity of agents in supplying necessary chemicals to him which aided to his conviction.

The Court rejected the use of its supervisory power under such a theory, reasoning that the "principal reason behind the adoption of the exclusionary rule was the government's 'failure to observe its own laws.'" 411 U.S. at 430 citing Mapp v. Ohio, 367 U.S. 643, 659 (1961). The Court pointed out that the government agent did not violate any federal statute or rule or commit any crime in that investigation. Id.

The Court did recognize that it had the ultimate supervisory authority over the Executive Branch:

> "The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to

enforce those limitations."
411 U.S. at 435.

A majority of the Court has stated that an available defense based upon the Court's supervisory power is viable. Hampton v. United States, supra, at 494-497 (Powell, J., Blackmun, J., concurring, Brennan, J., Stewart, J., Marshall, J., dissenting.)

Based on the record in this case, drug agents are given no responsible guidelines, training, regulations, workshops, lectures, or seminars to aid them in their zealous pursuit of suspected criminal traffickers when drugs are supplied for consumption by a potential defendant. There is absolutely no indication of medical or chemical expertise so that an unwary consumer who is administered phencyclidine or cocaine may be properly supervised.

The government cannot be allowed under the rubric of an effective tool to combat crime the pseudo-medical practices of drug agents whose only interest is the ferreting out of crime. To condone

such activity is to say the end justifies the means. To sanction unlawful activity in the pursuit of those dealing in unlawful activity is to allow the Court to sanction governmental "'failure to observe its own laws,'" 411 U.S. at 430, citing Mapp v. Ohio, supra. Under its supervisory power, the Court should reverse petitioner's conviction due to outrageous governmental conduct.

CONCLUSION

For all the reasons stated herein, petitioner respectfully requests this Court to grant the writ prayed for and review the decision below.

DATED: August 30, 1983

PHILIP A. DeMASSA
Attorney for Petitioner
JERRY THOMAS JOHNSON

EXHIBIT "A"

(Not to be published in official reports)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	Nos.
Plaintiff-Respondent,	)	82-1165;
	)	82-1166;
v.	)	82-1167;
	)	82-1168;
JERRY THOMAS JOHNSON,	)	82-1349
JEFFREY A. WALKER,	)	
CARLOS RUBIO-AMORROSTA,	)	D.C. No.
LEAH D. CHRISTIE, and	)	CR81-854
MICHELLE UNGER,	)	
	)	
Defendants-Appellants.	)	MEMORANDUM
	)	

Appeal from the United States District Court for the Southern District of California

Judith N. Keep, District Judge, Presiding

Argued and submitted December 8, 1982

Before: TANG, SCHROEDER and POOLE, Circuit Judges.

Appellants Johnson, Rubio-Amorrosta, Christie and Unger appeal their convictions of conspiracy to possess cocaine with intent to distribute, a

violation of 21 U.S.C. Section 846 and Section 841(a)(1). Walker appeals his conviction of conspiracy to possess cocaine, a violation of 21 U.S.C. Section 846 and Section 844. Christie and Rubio-Amorrosta appeal their convictions of using a telephone in facilitating the commission of a felony, a violation of 21 U.S.c. Section 843(b).

I. Outrageous Government Misconduct

Appellants argue that the indictments should have been dismissed because outrageous government misconduct violated their rights to due process.

The question of outrageous government misconduct is a question of law. U.S. v. McQuinn, 612 F.2d 1193, 1196 (9th Cir.), cert. denied, 445 U.S. 955 (1980). In United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied, 102 S.Ct. 2040 (1982), we recognized that this defense could be available even to a defendant predisposed to the charged crime. Id. at 882. We noted, however, that

> "This court has emphasized that the due process channel which Russell kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." (citations omitted).

Id. See also United States v. Abushi, 682 F.2d 1289, 1297 n.4 (9th Cir. 1982).

This district court applied the Bagnariol standard and concluded that there was no governmental misconduct in this case. That the government assumed the role of seller and provided illegal drugs for testing certainly calls for close scrutiny by the courts. But the district court's findings that the DEA investigation was directed at large dealers and that the roles taken by the DEA agents in the case were reasonable in that context are sound.

The trial court found no coercion of or pressure upon Rubio. The court also found from viewing the videotapes of the transactions between agents and appellants that the appellants did not appear threatened or intimidated by the

agents. These findings are not clearly erroneous. The district court's conclusion on this issue is consistent with our decisions in Abushi, Bagnariol, and McQuinn. We affirm on this issue.

II. Conspiracy

Appellants argue that all conspiracy convictions should be reversed because the government failed to prove a specific agreement between the appellants (prospective purchasers) and the agents (prospective sellers).

Appellants argue that this case is controlled by United States v. Melchor-Lopez, 627 F.2d 886 (9th Cir. 1980). Melchor-Lopez is distinguishable. In Melchor-Lopez, the evidence did not support an inference that any two persons involved in that case had agreed to anything. The facts of this case are more similar to the facts supporting the conspiracy conviction in United States v. Sangmeister, 685 F.2d 1124, 1126 (9th Cir. 1982) ("Jones agreed to find suppliers of cocaine, which Fair would deliver to buyers, and Jones arranged

Sangmeister for him to sell cocaine to Fair."). In the case before us, the evidence supports a finding of agreements between Unger and Christie to buy; and between Johnson and Freydberg (an indicted co-conspirator) to buy; and between Rubio, Garrison and Lawson to serve as intermediaries between the sellers and the buyers.

The fact that the ultimate transactions between the buyers and seller-agents were not completed does not compel reversal. The record proved agreement to accomplish an illegal objective on the part of each of the appellants. It proved as well overt acts taken in furtherance of the conspiracy, which acts, in themselves, need not be criminal. See United States v. Croxton, 482 F.2d 231, 233 (9th Cir. 1973). Their conspiracy convictions are therefore affirmed.

Walker, the only appellant convicted of the lesser offense of conspiracy to possess cocaine, argues that his conviction must be reversed, since no

other defendant was convicted of the lesser included offense of conspiracy to possess cocaine (without intent to distribute). This argument must fail. Walker's conviction is clearly a lesser included offense within the offense of which the other appellants were convicted. The convictions of all the other appellants necessarily include a finding that they each agreed to possess cocaine. That no other defendant was convicted only of the specific crime of conspiracy to possess, without the further intent to distribute, does not negate the finding by the jury that the defendant agreed, at the least, to possess cocaine. 1/

III. Multiple Conspiracies

Christie argues that because the government proved three or more

---

1/ The trial court properly directed the jury only to consider the lesser-included offense of agreement to possess if it found an individual not guilty of the greater charge. Both charges included agreement to possess cocaine.

conspiracies, though it charged only one, the trials of the different groups should have been severed to avoid prejudice. Because of the discrepancy in the evidence against the various groups of defendants and the possibility of prejudice, Christie argues that a severance should have been granted.

The government argues that there was a single conspiracy and that Rubio, Garrison and Lawson (not the government agents) were the core, and the rest of the appellants were brought in by them. To prove a single overall conspiracy, rather than several limited ones:

> The government must produce enough evidence to show that each defendant knew or had reason to know the scope of the distribution and retail organization involved with the illegal narcotics, derived from the operation were dependent upon the success of the entire venture.

United States v. Perry, 550 F.2d 524, 528-29 (9th Cir.), cert. denied, 434 U.S. 827 (1977) (emphasis in original).

Severance was not required in this

case because of any variance between the indictment and the evidence presented by the government. Although a single conspiracy may not have been proved, there was evidence that the "defendants had reason to know the scope of the retail and distribution organization." The only question was whether they knew that the benefits each derived "were dependent upon the success of the entire venture." There was evidence presented in this regard. We cannot so easily say that one conspiracy was not present. Cf. Kotteakos v.United States, 328 U.S. 750, 768 (1946) ("the jury could not possibly have found, upon the evidence, that there was only one conspiracy"). Moreover, the trial judge eliminated any potential for prejudice by "scrupulously safeguard(ing) each defendant individually, as far as possible, from loss of identity in the mass." Kotteakos, 328 U.S. at 777.

Under these circumstances, the trial judge did not abuse her discretion by refusing to sever the trial. See United States v. Gee, 695 F.2d 1165, 1169-70

(9th Cir. 1983) (discussing showing needed for severance). Even assuming a single conspiracy was not proved, the variance between the indictment and the proof must affect the substantial rights of the parties. United States v. Kenny, 645 F.2d 1323, 1334 (9th Cir.), cert. denied, 452 U.S. 920 (1981). Reversal is appropriate only if defendants prove prejudice. United States v. Durades, 607 F.2d 818, 819 (9th Cir. 1979). Since no such prejudice has been proved here, no error was committed in failing to sever the trial.

IV. Voir Dire

Appellants argue that the void dire of the jury was so inadequate that appellants were denied a fair and impartial jury.

Reversal of a trial judge's voir dire is warranted when there has been an abuse of discretion. United States v. Pimentel, 654 F.2d 538, 542 (9th Cir. 1981). If the questions asked by the court are capable of revealing prejudices, the specific questions

offered by counsel need not be asked. United States v. Giese, 597 F.2d 1170, 1182-83 (9th Cir.), cert. denied, 444 U.S. 979 (1979).

Defense counsel submitted 13 pages of requested questions, many of which were asked by the Court. The voir dire as conducted did not involve an abuse of discretion.

V. Evidentiary Rulings

A. Cross-Examination of Unger

Unger objects to the government's cross-examination of her on the events of June 11-13 as beyond the scope of direct.

The trial court has broad discretion in determining the scope of cross-examination. United States v. Higginbotham,, 539 F.2d 17, 24 (9th Cir. 1976). A defendant who takes the stand may be cross-examined on matters "reasonably related" to the defendant's testimony on direct. United States v. Hearst, 563 F.2d 1331, 1340 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978).

The purpose of Unger's direct

testimony had been to give an innocent explanation for the safes and the triple beam scale in her home - in short, to negate criminal intent. The questioning on cross-examination was intended to show that Unger had a bottle of methyl alcohol, sometimes used to test cocaine, at her home, and that she had bought the alcohol at a 7-Eleven store on June 13. Thus, the purpose of the cross-examination was to rebut the suggestion of innocent uses of items found in Unger's home - to show criminal intent. The questions on cross-examination were "reasonably related" to Unger's testimony on direct. We affirm the district court's ruling on this issue.

B. Rebuttal Evidence against Christie and Unger

Unger and Christie argue that the district judge erred in allowing a prosecution witness to rebut Unger's testimony denying her knowledge, purchase and ownership of a bottle of methyl alcohol found in her home. The testimony

objected to was that of DEA Agent D'Ulisse, a rebuttal witness. D'Ulisse testified that on the evening of June 13, he saw Christie and Unger drive from a 7-Eleven store where they had met Agent Mazzilli, to another store, carry a bag to the car, and return to Unger's home. This contradicted Christie's testimony that after she and Unger met Agent Mazzilli at a 7-Eleven store, Unger told Mazzilli there was no deal and that Christie and Unger had immediately driven directly to Unger's home without stopping anywhere else.

Unger argues that this rebuttal evidence was improperly admitted because it was extrinsic evidence offered to impeach on a wholly collateral matter and was thus inadmissible under Rule 608(b).

D'Ulisse's testimony was extrinsic, and clearly impeached Unger and Christie. The question is whether the testimony was admissible for some other purpose.

The district court conceded that the testimony was intended to impeach, but that it was also intended to rebut

Christie's and Unger's contention that if they had ever intended to conspire, they had abandoned that intent. Since the testimony, therefore, went to the critical issue of intent, it was held admissible.

The trial judge's reasoning is sound. The testimony not only impeached, but was evidence supporting another view of a central issue in the case: whether Christie and Unger had abandoned their intent to test the cocaine and continue dealing with the agents. As such, the evidence not only went to the truthfulness of Christie and Unger's testimony, but directly to the government's theory of its case against them.

United States v. Green, 648 F.2d 587 (9th Cir. 1981) is distinguishable. There, the court found error in the admission of certain extrinsic evidence introduced to attack defendants' credibility. Id. at 596. The Green court however, noted that "the question of what 'purpose' is served by the

introduction of certain testimony, and therefore its admissibility under Rule 608(b), is a determination that must be left in the first instance to the trial court." Id. Because the testimony of two witnesses in Green "was designed primarily as an attack on the defendants' credibility," its introduction was error. Other testimony admitted, however, even though it contradicted the testimony of the defendants, was found not to have been erroneously admitted because it was "admissible to demonstrate capacity, or some other relevant aspect of the government's case." Id. Because in this case the testimony was admissible to establish intent, and to rebut Appellants' contention that they had abandoned that intent, we affirm on that issue.

C. Expert Testimony

Johnson argues that he was denied a fair trial because he was not allowed to present the testimony of linguistic experts in his defense. The jury viewed the videotaped conversations that were

the subject of the proposed expert testimony. The trial court held that the capes were clear and the proposed testimony would confuse and mislead the jury in addition to wasting time.

Whether expert testimony should be admitted is a matter for the trial court's broad discretion and "unless manifestly erroneous," we will sustain the trial judge's decision. United States v. Tsinnjinnie, 601 F.2d 1035, 1040 (9th Cir. 1979), cert. denied, 445 U.S. 966 (1980). The trial judge's decision to exclude expert testimony was not "manifestly erroneous." We affirm the exclusion.

D. Videotapes of Johnson & Agents

The government entered into evidence two videotapes of conversations between Johnson and the agents made the day of the arrest. Johnson argues that the portion taken after Johnson told the agents he didn't want their cocaine should not have been admitted because it constituted evidence of "other crimes," (past and future) and was thus

inadmissible under Fed. R. Evid. 404(b).

The district judge ruled that evidence of prior bad acts was more prejudicial than probative, and allowed only discussion of future plans to remain. The court's ruling that the statements were relevant to interpet the entire transaction was not an abuse of discretion. We affirm.

VI. Rubio's Request for Travel Funds

Pursuant to 18 U.S.C. Section 3006A(e) (Criminal Justice Act), Rubio's appointed counsel requested travel funds to interview Joao Magalahaenes in prison in Brazil for possible exculpatory information about Rubio's past dealings with Magalahaenes.

The district judge denied Rubio's motion on the grounds that the affidavit supporting the motion was insufficient. Rubio argues that he was prejudiced by this denial because an interview with Magalahaenes could have produced information helpful to Rubio's entrapment defense.

The standard for reviewing a denial

of funds under the Criminal Justice Act is whether "a reasonable attorney would engage such services for a client having the independent financial means to pay for them." United States v. Sims, 617 F.2d 1371, 1375 (9th Cir. 1980) (in the context of funds for expert witness). In order to obtain reversal based on denial of funds, an appellant must show prejudice by clear and convincing evidence. Id.

According to appellant, Magalahaenes' testimony would have shown that he entered into no transactions with Rubio. Since Magno testified that Magalahaenes knew that Rubio had the capacity to supply cocaine, the testimony from Magalahaenes that he entered into no transactions with Rubio would not help Rubio. In view of the evidence showing Rubio's capacity to distribute cocaine (in that he knew many persons interested in buying large quantities of cocaine), he has not shown that the denial of funds prejudiced him. We affirm the ruling on this issue.

The judgments are AFFIRMED.

EXHIBIT "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	Nos.
	)	82-1165,
Plaintiff-Appellee,	)	82-1166
	)	
v.	)	D.C. CR
	)	81-854
JERRY T. JOHNSON and	)	
JEFFREY A. WALKER,	)	ORDER
	)	
Defendants-Appellants.	)	
	)	

Before: TANG, SCHROEDER and POOLE, Circuit Judges

The panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.